

## **TAB 1**

# **The New Temporary Foreign Worker Regulations: Overview and Impact Post April 1, 2011**

**Stephen Green, C.S.**  
*Green and Spiegel LLP*

**19<sup>th</sup> Annual Immigration Law Summit – Day One**



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

**CONTINUING PROFESSIONAL DEVELOPMENT**



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

## **The New Temporary Foreign Worker Regulations: Overview and Impact Post April 1, 2011**

**19<sup>th</sup> Annual Immigration Law Summit  
November 23 and 24, 2011**

**Stephen Green, C.S.  
Green and Spiegel LLP**

### **Objectives of the Temporary Foreign Worker Regulations**

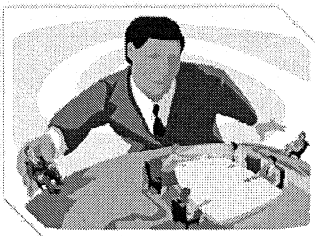
- Reduce the potential for TFW exploitation by employers and third-party agents, thereby better protecting TFWs who work in Canada (nanny)
- Implement stricter employer accountability mechanisms, including a denial of service provisions, thereby encouraging greater adherence by employers to the terms and conditions of their job offers with respect to wages, working conditions and occupations
- Underline that employment facilitated through the TFWP is meant to be temporary in nature

## Labour Market Opinion

- As of April 1, 2011, HRSDC will also evaluate:
  - The **genuineness** of the offer of employment
    - (1) Whether employer is actively engaged in the business in which the job offer is being made
    - (2) Whether the offer is consistent with the reasonable employment needs of the employer
    - (3) Whether the terms of the offer are terms that the employer is reasonably able to fulfill
    - (4) **The past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work**

## Labour Market Opinion

- As of April 1, 2011, HRSDC will also evaluate whether the job offer is **substantially the same** as others made to foreign workers in the past two years
- HRSDC will compare:
  - Wages
  - Working conditions
  - Employment in the occupation



## **LMO Analysis**

HRSDC will conduct the following assessment before granting an LMO:

1. Genuineness of Job Offer
2. Labour Market Impact
3. Consistency with Federal-Provincial/Territorial Agreements
4. Substantially the Same "STS"

## **"Substantially the Same" (STS)**

- (a) Two year period prior to the application
- (b) Each Temporary Foreign Worker received substantially the same
  - (i) wages
  - (ii) working conditions
  - (iii) employment in the occupation

as set out in the **offer of employment**

## **“Substantially the Same” (STS) - Wages**

Definition of substantially the same wages is **within 2%** of the wages originally offered

- If discrepancy in wages greater than 2%, employer may be required to pay compensation
- If actual wages paid to employee is greater than originally offered, no compensation is required
- Unauthorized wage changes, including bonuses, may be a warning flag to HRSDC

## **“Substantially the Same” (STS) – Working Conditions and Occupation**

Working conditions include:

- Generally acceptable Canadian standards, including benefits
- TFW program requirements

Details of the occupation include job title and duties as per the NOC

- If there is a discrepancy with a current employee, a new LMO should be obtained

## **Justification of Non-Compliance**

Justification where STS is not met:

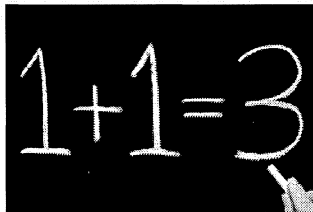
- (a) Change in collective agreement
- (b) Change in economic conditions
- (c) Good faith errors
- (d) Unintentional accounting or administrative errors
- (e) "Circumstances similar"

## **Good Faith Error**

- (a) Obligations under the job offer
- (b) Provided compensation
- (c) Sufficient efforts to correct error
- (d) Compensation to an Employee that has left the Employer

## Unintentional Accounting or Administrative Error

- (a) Provide compensation
- (b) Sufficient efforts to correct error
- (c) Compensation to an Employee that has left the Employer



## Period of LMO Validity

- (a) 6 month period
- (b) Period begins on date of application to CIC or CBSA

## Length of Employment

- (a) 48 month cap of actual employment
- (b) For intermittent travellers, calculate actual employment time
- (c) 186 & 187 working in Canada “after sales service”
- (d) April 1, 2011 start date
- (e) Foreign Nationals must maintain records of entry to Canada

## After 48 Month Cap is Reached

- (a) Work Permit expires
- (b) Foreign worker must leave Canada
- (c) New Work Permit will **NOT** be issued unless:
  - (i) A period of 48 months has passed since the accumulation of the 4 years work in Canada
  - (ii) Work would have significant social, cultural or economic benefit to Canada
  - (iii) Work is pursuant to an international agreement



## Cap of Eligibility for a Work Permit

48 month CAP does not apply to sections 204 and 205 of the IRPR

- a) NOC 0 or A occupations
- b) Intra-company Transfer (5/7 Year)
- c) Spousal Work Permits
- d) Student Work Permits
- e) Working holidays
- f) Significant benefit

## Determination of Issuance of a Work Permit

- (a) CIC
- (b) CBSA
- (c) HRSDC



## **Current Issues**

### **1) When does one need to apply for a new LMO?**

- NOC remains the same
- Expanded responsibilities
- Increase in wages greater than 2%
- Who needs to be notified?

## **Current Issues**

### **2) What about Intra Company Transferees?**

- NOC remains the same
- Expanded responsibilities
- Increase in wages greater than 2%
- Who needs to be notified?

**TAB 1a**

**Temporary Foreign Worker Program**

**Steven West**  
**Director, Program Implementation Division**  
**Temporary Foreign Workers Program**  
*Human Resources and Skills Development Canada*

**19<sup>th</sup> Annual Immigration Law Summit – Day One**



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

**CONTINUING PROFESSIONAL DEVELOPMENT**

**1a**



Human Resources and  
Skills Development Canada

Ressources humaines et  
Développement des compétences Canada

Canada

Now and Tomorrow  
Excellence in Everything We Do



## Temporary Foreign Worker Program

19th Annual Immigration Law Summit -  
November 23 - 24, 2011  
Toronto, ON

## Overview

- Overview of the LMO assessment process
- IRPA S. 91 and genuineness provisions
- Changes in processing as a result of regulatory changes
- Upcoming changes
- Variations in advertizing

## The LMO Assessment Process

- In 2011, a number of changes were brought to *IRPR* and *IRPA* to improve program integrity. As a result, the LMO assessment process changed. It is now comprised of 4 steps:
  - 1) Verifying that the employer's name is not on the CIC ineligibility list and that their third-party representative (if applicable) is authorized under S.91 of *IRPA*;
  - 2) Ensuring that the job offer is consistent with the terms and conditions of federal-provincial/territorial immigration agreements;
  - 3) Verifying the genuineness of the job offer; and
  - 4) Assessing whether the entry of the TFW will have a negative impact on the Canadian labour market, and determining whether a returning employer has respected the terms and conditions of employment in previous LMO confirmation letters and annexes.
- The job offer must meet the requirements of each step in order to move forward through the remaining steps and receive a positive opinion.



## Section 91 - Eligibility of Third Party Representatives

- Should an employer use the paid service of a third party representative (immigration consultants, employment agencies, lawyers, etc.) at any stage of the LMO/AEO application process, that representative must be authorized under section 91 of *IRPA*.
- Paid third party representatives include:
  - o lawyers and paralegals in good standing with a provincial or territorial law society; or
  - o notaries in good standing with the Chambre des notaires du Québec; or
  - o immigration consultants in good standing with the Immigration Consultants of Canada Regulatory Council.



## **R203 (1) (a) / R200(5)- Genuineness**

- The genuineness of the job offer made to the TFW will be assessed based on whether :
  - a) the employer is actively engaged in the business in which the job offer is being made (does not apply to LCP);
  - b) the job offered to the TFW meets the reasonable employment needs of the employer and is consistent with the type of business the employer is engaged in;
  - c) the employer is reasonably able to fulfil the terms and conditions of the job offer; and
  - d) the employer, or the third-party representative acting on behalf of the employer, is compliant with the relevant federal or provincial/territorial employment and recruitment legislation.
- The level of information required from employers to make this assessment will depend on the employer's history with the Program (or lack thereof), and information that is publically available or available through applicable information sharing agreements with provinces.

## **R203 (1) (a) / R200(5)- Genuineness - a)**

- Requirements: the employer should have an operating/functioning business, providing either goods or services and must have a work location in Canada where the TFW would work.
- All employers will need to submit their Canada Revenue Agency business number with their application and describe their main business activities.
- Additionally, new employers will be required to provide a copy of their business licence or permit to substantiate that they are actively engaged in a business related to the offer. Returning employers may be asked for this.
- Where a business license/permit is not required by the municipality/province, the employers may also submit:
  - Select CRA documents
  - Business contracts for goods and/or services;
  - Provincial/territorial workers compensation clearance letter or other provincial/territorial documentation indicating the employer is in good standing with relevant regulatory body;
  - Attestation by a lawyer, notary public or chartered accountant confirming the employer exists and the type of business the employer operates .

## **R203 (1) (a) / R200(5)- Genuineness - b)**

- Requirements: the job offered must match the general type of work that is reasonably and usually part of employment in that business/sector and the requesting business should be experiencing growth and/or attrition, conditions that would normally require the hiring of a new employee.
- Employers must provide an explanation on their LMO application of how hiring a TFW meets their employment needs. This information will be used to assess this factor.

## **R203 (1) (a) / R200(5)- Genuineness - c)**

- Requirements: the employer is capable of providing, for the duration of the work permit, full-time work in line with the job description and acceptable employment standards. This includes the employer's ability to pay the salary and benefits, to meet the working conditions, to provide a safe work environment, and (where required), to adhere to specific programmatic requirements.
- Employers must sign a series of statements on their LMO application attesting that they can fulfil the terms of the job offer.
- Some employers may be asked to submit proof of their financial ability to fulfil the terms of the job offer including one or more of the following:
  - o T4 Summary of Remuneration paid
  - o Schedules 100 and 125 of CRA T2 corporate income tax return
  - o T2125 Statement of Business or Professional Activities (unincorporated businesses)
  - o Business contracts for future goods and/or services
  - o An attestation signed by a lawyer, notary public or chartered accountant

## **R203 (1) (a) / R200(5)- Genuineness - d)**

- Requirements: the employer, or anyone that recruited the foreign national on their behalf, is compliant with federal/provincial/territorial laws regulating employment and recruitment in the province/territory where the work will take place.
- Employers must sign statements on their LMO applications attesting that they and their third party (if applicable) are compliant and will continue to be.
- Some employers may be asked to submit proof of their of their compliance, or that of their third party by providing:
  - Provincial/territorial workers compensation clearance letter or other provincial/territorial documentation indicating the employer is in good standing with relevant regulatory body

## Genuineness and LCP

- LCP employers must demonstrate:
  - i. a reasonable need for a full-time live-in caregiver to provide child care, elder care or care for a person with a disability;
  - ii. their capacity to provide adequate, private accommodations to the live-in caregiver; and
  - iii. that they have sufficient financial resources to pay the live-in caregiver.
- LCP employers must submit the following documentation with their LMO application form:
  - Proof of age or disability for the person requiring care;
  - A detailed description of the private accommodations to be provided to the live-in caregiver; and
  - A CRA Notice of Assessment.

## Changes in processing

- Due to greater officer intervention required under the new *IRPR* regulations and S.91 of *IRPA* the LMO assessment process is more lengthy, which has resulted in processing delays in most regions.
  - Need to collect and assess more information on employers and their third party representatives
- HRSDC recommends that employers conduct their human resource activities and planning based on anticipated LMO and work permit timeframes.

## Upcoming changes

- Third party form – employers using the services of a third party representative and/or recruiter will be required to provide details via a new third party form
  - Required for the administration of Section 91 of *IRPA* and R200(5) of *IRPR*
- Web service – following a registration process, employers and their designated third parties will be able to electronically submit LMO applications
  - Currently being tested and will be live January 2012



## Variation to advertising requirements

- Employers wishing to hire TFWs must first demonstrate that they made reasonable efforts to hire Canadians and permanent residents.
- At a minimum, employers must advertise for 14 calendar days in the three months preceding their LMO application.
  - o NOC O & A, Job Bank or recruitment consistent with the practice within that occupation
  - o NOC B, C and D, Job Bank and recruitment consistent with the practice within that occupation
- Variations to the advertisement requirements apply in certain cases
  - o Occupational and/or provincial exceptions (see HRSDC website).

## Summary: key messages

- LMO assessment process is comprised of 4 steps which involve new front end and back end integrity measures. Failure to satisfy the condition of any step will result in a negative LMO.
- Section 91 of *IRPA* regulates who can provide representation for the purpose of the TFWP – paid representatives must be authorized.
- Genuineness – additional documentation may be required to demonstrate the genuineness of the job offer.
  - o Genuineness d) relates to third parties conducting recruitment activities.
- A new third party form will be required with the application for employers that use recruiters or representatives.
- IRPR and IRPA changes and officer learning curve has contributed to current LMO processing timeframes.
- Web service 2012 will simplify and expedite the LMO application process .
- Employers must always attempt to hire Canadians and permanent residents prior to applying for an LMO. Exceptions to basic requirements may apply.